

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1040

Cir. Ct. No. 2013FA99

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

MICHAEL A. SPADARO,

PETITIONER-RESPONDENT,

V.

JACQUELINE R. HUNEK, F/K/A JACQUELINE R. SPADARO,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
JOSEPH W. VOILAND, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Jacqueline R. Hunek appeals the property division portion of a divorce judgment, challenging the circuit court's determination that her former husband, Michael A. Spadaro, did not waste marital assets. According

to Hunek, Spadaro's inability to account for \$75,635 of his income over a several-year period constitutes waste entitling Hunek to half that amount's value. We conclude that the circuit court properly exercised its discretion in determining that Spadaro did not waste marital assets. We affirm.

¶2 The parties married in 1977 and have adult children. The parties lived in Ohio for most of the marriage and Spadaro was the primary breadwinner. In 2006, they moved to Wisconsin for Spadaro's job but frequently travelled to Ohio to visit family. In July 2010, Hunek remained in Ohio and the parties separated. Spadaro provided financial assistance to Hunek and continued his frequent travel between Wisconsin and Ohio.

¶3 Spadaro filed for divorce in March 2013. The parties suspended proceedings to attempt reconciliation but revoked the suspension after about five months. A temporary order directed Spadaro to make monthly maintenance payments to Hunek in the amount of \$2,800, and to split equally with Hunek an upcoming bonus check. Spadaro complied.

¶4 At a one-day court trial, Hunek's attorney presented Exhibit 26, which purported to be a summary of Spadaro's earnings and income for the period between March 2011 and July 2014.¹ A law student working for Hunek's attorney

¹ Exhibit 26 was entitled "Summary of Money Available to Michael Spadaro from Income from Employment and Sale of Stocks and 401K Withdrawals After Deduction of Tax Withholding and Payroll Deductions and Commissions and other Miscellaneous Deductions" It relied on numbers from other exhibits and for each year, summarized the net funds available to Spadaro after taxes and other withholdings. According to the exhibit, the money available to Spadaro from his employment, stock options and 401(k) account withdrawals between March 2011 and July 2014 totaled roughly \$360,000.

provided testimony about the exhibit, namely, how she arrived at the numbers reflected in Exhibit 26.

¶5 Spadaro testified that the parties had no savings when they separated in 2010. For nearly two and one-half years following the separation, Hunek lived with another man but Spadaro provided financial assistance and Hunek remained covered by Spadaro's health insurance. In December 2012, when Hunek decided to live on her own, Spadaro helped pay for her new apartment, co-signed her lease, and paid about \$2000 to ship household furnishings from Wisconsin to Ohio. Spadaro made monthly payments to Hunek by depositing funds into a checking account for her use, and he also paid for her health and car insurance, phone, dental and car repair bills, and other sundries. Spadaro spent a significant amount of money travelling between Wisconsin and Ohio, for example, taking ten to fifteen trips just between 2010 and 2012.

¶6 Spadaro testified that during the marriage, the parties regularly provided financial assistance and gifts to their children and grandchildren, and that he continued this practice after the separation. Spadaro admitted having gambled over the years, most heavily before 2006, but some after the separation. Spadaro also testified that he had taken three vacations since the separation and told the court he planned to retire at the end of January 2015, when he turned sixty-five years old. He owed over \$28,000 in income taxes for the years 2012 and 2013 and would likely owe taxes for 2014.

¶7 The circuit court ordered the parties to file post-trial briefs on maintenance, property division, and any request for attorney fees. In post-trial briefing, Hunek started with Spadaro's income as stated in Exhibit 26 and subtracted from that number his payments to Hunek and his estimated budget

expenses provided in a financial disclosure statement. According to Hunek’s trial brief, the numbers reflected that from the period between March 2011 and July 2014, there should have been a surplus of \$75,635. Noting there was no specific accounting of how Spadaro spent this money, Hunek asserted that Spadaro squandered or wasted \$75,635 and requested an award of \$40,000 to represent her one-half share plus potential interest.

¶8 The circuit court awarded maintenance, divided the parties’ debt, determined that the marital estate should be equally divided, and declined to award attorney fees.² The circuit court further determined that Spadaro’s expenditures did not constitute waste, finding that his spending patterns did not significantly change after the separation and that “the couple had little to show for their work from 1997-2010 when they separated and still had little to show for it in 2014.” The circuit court explained:

Mr. Spadaro credibly testified that before their separation in 2010 the couple spent money on their children, their grandchildren, on some unmeasured gambling, and other family activities.

Mr. Spadaro also credibly testified that after their separation in 2010 the money was spent similarly. The court has drawn the reasonable inference that if he gave any money to children or grandchildren, it was done so with the consent of [Ms. Hunek]- she offered no credible evidence to the contrary. Mr. Spadaro added that for much of the time he also was funding two households, first through deposits into a joint checking account to which [Ms. Hunek] had access, then through approximately \$2,000 in monthly transfers to [Ms. Hunek] beginning in December

² On appeal, Hunek does not contest the circuit court’s maintenance award, debt division, or decision to split the marital property equally. Hunek’s brief seeks appellate review of the attorney fees decision only if she prevails on appeal. Because we affirm the circuit court’s decision on the unaccounted for assets, we will not review the circuit court’s decision denying attorney fees.

2012, and later through \$2,800 monthly temporary maintenance payments. He admitted he took vacation, but indicated that he needed vacation given the amount of time he spent working. He admitted he did some gambling, but no evidence showed that he lost any material sum of money doing so.

The circuit court characterized Spadaro’s testimony as “clear, reasonable, credible and convincing.”

¶9 On appeal, Hunek contends that the circuit court erroneously determined that Spadaro did not commit waste based on his failure to account for \$75,635 in income between March 2011 and July 2014. Spadaro argues that the circuit court’s decision was properly based on the facts of record, the court’s credibility determinations, and the correct law.

¶10 Property division decisions are entrusted to the circuit court’s discretion and will not be disturbed on appeal absent an erroneous exercise of that discretion. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. A reviewing court looks for reasons to sustain discretionary decisions. *Steiner v. Steiner*, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740. The circuit court’s findings of fact will not be set aside unless they are clearly erroneous. *Steinbach v. Green Lake Sanitary Dist.*, 2006 WI 63, ¶10, 291 Wis. 2d 11, 715 N.W.2d 195; WIS. STAT. § 805.17(2) (2015-16).³

¶11 WISCONSIN STAT. § 767.63 creates a rebuttable presumption that any asset with a fair market value of \$500 or more is part of the divisible marital estate if it was “transferred for inadequate consideration, wasted, given away, or

³ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

otherwise unaccounted for by one of the parties within one year prior to the filing of the petition” If the circuit court determines that marital assets were wasted, it has the authority to treat the wasted assets as part of the divisible marital estate. *Derr v. Derr*, 2005 WI App 63, ¶65, 280 Wis. 2d 681, 696 N.W.2d 170. Whether there has been waste or squandering of marital assets is a discretionary determination by the trial court. See *Anstutz v. Anstutz*, 112 Wis. 2d 10, 11-13, 331 N.W.2d 844 (Ct. App. 1983).

¶12 We conclude that the circuit court properly exercised its discretion in determining that Spadaro did not commit waste. Spadaro testified that in addition to his monthly payments to Hunek and other budgeted expenses, he gave extra money to Hunek, provided financial assistance and gifts to their children and grandchildren, traveled back and forth from Wisconsin to Ohio, and took several needed vacations. Hunek presented no evidence to the contrary. The circuit court determined that Spadaro’s testimony was credible. “The weight and credibility to be given testimony is uniquely within the province of the trial court.” *Covelli v. Covelli*, 2006 WI App 121, ¶14, 293 Wis. 2d 707, 718 N.W.2d 260. The circuit court’s factual findings are not clearly erroneous and support its conclusion that Spadaro did not commit waste.

¶13 Hunek argues that by providing financial assistance and gifts to the children and grandchildren, Spadaro squandered or gave away assets in violation of WIS. STAT. § 767.63. She challenges the circuit court’s finding that this was done with her consent, complaining that the circuit court made no supporting findings of fact. We disagree. Spadaro testified that from 2006 to 2010, he financially assisted their children and grandchildren and that Hunek was aware of and participated in this practice. Hunek offered no evidence to the contrary and Spadaro’s testimony supports a finding of constructive, ongoing consent. Even

now, Hunek does not argue that she was not aware or did not approve of Spadaro's financial assistance to the children and grandchildren.

¶14 Hunek further argues that the circuit court failed to adequately explain the findings of fact and reasoning supporting its conclusion that Spadaro did not commit waste. She takes issue with the circuit court's determination that the law student's testimony "was not particularly credible" and suggests this led the circuit court to improperly ignore Exhibit 26. We disagree.

¶15 Hunek's Exhibit 26 simply established the amount of Spadaro's income from earnings, 401(k) withdrawals, and stock sales during the period from March 2011 to July 2014. The circuit court correctly found that the law student's testimony regarding the raw numbers did not credibly prove "waste." Further, the broad time period used in Hunek's analysis dilutes its relevance and probative value. The focus on Spadaro's expenditures starting two years before the commencement of the divorce action and continuing through the reconciliation suspension period does not prove waste under WIS. STAT. § 767.63, especially in light of Spadaro's testimony and his court-ordered responsibility to pay over \$28,000 in outstanding income taxes.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

